No. 11419

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

PAUL JOHN HUNT,

Appellant,

vs.

SECURITIES AND EXCHANGE COMMISSION,

Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE LLOYD L. BLACK, *Judge*

Reply Brief

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INDEX

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A perusal of Appellee's answering brief discloses the grounds upon which it declares that the conviction and fining of Appellant should be sustained. The points depended on are as follows:

1st. Are Appellant's sales of securities of the same issue subsequent to the decree by wholly intrastate use of the mails in contempt of that decree?

2nd. May Appellant collaterally attack the permanent injunction in the course of a contempt proceeding?

In support of question number one, Appellee cites numerous excerpts from the Securities Act of 1933 and seems quite content with the conclusion that said Act was promulgated, not only to be applied to interstate business, but also to intrastate commerce in its fullest and deepest meaning.

Having fully convinced itself thusly as to the status of interstate and intrastate commerce, it blandly and, seemingly, unconscious of its purport, quotes and adopts the following:

"Nothing in this title shall affect the jurisdiction of the securities commission (or any agency or office performing like functions) of any State or Territory of the United States, or the District of Columbia, over any security or any person."

Sec. 18, 15 U. S. C. A. Sec. 77 r.

In the face of this unequivocal provision we ask the question---Does the fact of pursuing intrastate commerce place one in contempt of an order prohibiting participation in interstate commerce. We respectfully submit that it does not.

For answer to question number two we admit that a party cannot collaterly attack a permanent injunction in the course of a contempt proceeding. This rule is supported by common sense. However, it must also be APPLIED by a rule of common sense *and legality.*

Appellee does not question the validity of the injunction when applied to interstate commerce. Nowhere in the record can any such an intimation be found. This appeal is not based upon any question as to the validity of the injunction but is based upon its illegal application and it is from this illegal application that appellant appeals.

From the injunction appellant had no right nor inclination to appeal; but from an erroneous and illegal application of the injunction appellee has the right to appeal and did appeal at the earliest opportunity.

That the injunction was ambiguous the Court remarked in its Oral Decision:

"I think the decree could have been a bit plainer than it was, that is the decree of February 18, 1946."

Printed Record, Page 26.

This shows that this appeal is in no way allied to the injunction itself but rests exclusively in the construction and application of the same, a matter in which Appellant has a right of appeal.

In Appellee's COUNTER-STATEMENT OF THE FACTS it very adroitly seeks to convey the impression that Appellant was wilfully and maliciously invading the zone of interstate commerce per. se., and in a wholesale manner.

This impression is quite erroneous, for as said by the Court in its Oral Decision:

"However, I am satisfied that in imposing the sentence the Court should consider his (Appellant's) good faith and the good faith of his counsel."

Printed record, page 26.

On page 7 of said brief under the heading of "APPELLANT'S SALES OF SECURITIES EFFECTED AFTER THE INJUNCTIVE DECREE BY THE WHOLLY INTRASTATE USE OF THE MAILS WERE IN CONTEMPT OF THAT DECREE", and in support of this conclusion states on the same page: "The Act, the complaint, and the decree all refer to the sale of unregistered securities by the use of any means *or* instruments of transportation *or* of the mails * * *" (emphasis supplied). And then goes on to remark:

"Despite this clear and unmistakable language, appellant has chosen to read the disjunctive 'or' as a conjunctive 'and', contending that the decree is applicable only to interstate commerce, and that the use of the mails intrastate is not included within its scope."

Appellee holds that the distinction between the disjunctive *or* and the conjunctive *and* is of the utmost importance, in fact decisive of the case at bar, and with this important distinction in mind charges that Appellant seeks to substitute *and* for *or*.

A reference to the facts will elucidate this problem.

The injunction issued on February 18th, 1946, is based upon the provisions of Sec. 5 (a) of both the original Act, and said Act as amended. Throughout said section the disjunctive *"or"* is used, while in the title to each of said Acts, the conjunctive *"and"* is used.

This being true the question as to what is the proper construction to be placed on such a condition arises, and what was the intent of Congress.

This rule is clearly announced as follows:

"Where, however, an error is such that one reading the title might be misled thereby, the title is insufficient; and a court cannot, under the guise of disregarding surplusage, reject a part of the title of an Act for the purpose of saving the Act, nor, on the other hand, can it supply omitted words in order to make the title conform to the body of the Act.

"Since a constitutional requirement that the subject of a statute be expressed in its title is generally regarded as mandatory, the title is an essential part of an act, and the subject expressed in the title fixes the limit of the valid scope of the act.

"The provisions of an Act must correspond with the

subject expressed in its title; so nothing can validly be included in the body of a statute which is not expressed in or covered by the title, and all parts of an Act which are not within its title are unconstitutional and void."

59 C. J., page 811, Secs. 392-393.

Observing the foregoing universal rule and applying it to the case at bar and in the eloquent language of Appellee, slightly paraphrased, we find that:

The Act, the complaint, and the decree all refer to the sale of unregistered securities by the use of any means *'or'* instruments of transportation *'or'* communication in interstate commerce *'or'* of the mails * * * (emphasis supplied) yet, despite the clear and unmistakable language (of the above rule of law) Appellee has chosen to read the conjunctive *'and'* as the disjunctive *'or'*; contending that the decree is applicable to both interstate and intrastate commerce, and that the use of the mails intrastate *is* included within its scope.

The title to the SECURITIES ACT OF 1933, both in the original and as amended reads:

AN ACT

"To provide full and fair disclosure of the character of securities sold in interstate *and* foreign commerce *and* through the mails, and to prevent frauds in the sale thereof, and for other purposes."

This Act calls attention to: "The character of securities sold in interstate and foreign commerce and through the mails."

It does not in any way delineate any securities, or when or where this "through the mails" is to apply; and the only lucid conclusion is that it applies to securities sold in interstate and foreign commerce through the mails.

It is unreasonable to conclude that the Act, in any way, includes the legal sale of local, intrastate securities sold "through the mails." If it means that, it should have said so, and inasmuch as it does not do so, this explanation cannot be supplied by any extraneous course of reasoning.

We most respectfully maintain that Appellant in continuing the sale of securities in intrastate commerce

was in no way in contempt of the injunction issued on the 18th day of February, 1946, and the decision of the lower Court should be reversed.

Respectfully submitted,

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